(3)

No. 86-857

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
*Petitioner,*
v.
ROMESH GULATI,
*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of Minnesota**

## MOTION OF THE NATIONAL RAILWAY LABOR CONFERENCE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

I. MICHAEL GREENBERGER
(Counsel of Record)
THOMAS J. MIKULA
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
General Counsel
NATIONAL RAILWAY
LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7218
Counsel for *Amicus Curiae*

Dated: December 24, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

---

No. 86-857

---

BURLINGTON NORTHERN RAILROAD COMPANY,
*Petitioner*,

v.

ROMESH GULATI,
*Respondent*.

---

**On Petition for a Writ of Certiorari to the Supreme Court of Minnesota**

---

## MOTION OF THE NATIONAL RAILWAY LABOR CONFERENCE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

---

The National Railway Labor Conference hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*, in support of the petition for a writ of certiorari.[1]

Virtually all the nation's Class I railroads are members of the Conference. The Conference represents its member

---

[1] Pursuant to Rule 36(1) of this Court, the Conference has requested the parties' consent to the filing of the attached brief as *amicus curiae*. A letter indicating that the petitioner has consented has been filed with the Clerk of this Court. The respondent, however, declined to consent to the filing of this brief, thus necessitating this motion.

railroads both in national collective bargaining with unions pursuant to the Railway Labor Act and in regard to other labor-management relations problems that are of concern to the railroads generally. In addition, the Conference serves as a clearinghouse for information regarding, and renders assistance and advice to member railroads concerning, the mandatory system of administrative remedies established by the Railway Labor Act for settling disputes arising out of workplace grievances.

In recent years many of the Conference's members have been named as defendants in lawsuits by their employees seeking to resolve grievances that arise out of the employment relationship. Instead of seeking relief for these grievances through the mandatory system of administrative remedies created by the Railway Labor Act, these employees have sought relief under state law, principally tort law. The claim involved in this case for intentional infliction of emotional distress arising from an alleged pattern of harassment from supervisors and co-workers, is typical of these efforts to circumvent the grievance process. A majority of the state and federal courts that have faced the question of whether these cases can go forward have held that the Railway Labor Act preempts these claims. Some courts, however, have allowed railroad employees to avoid the Railway Labor Act's mandatory scheme of administrative remedies by pleading employment grievances in the form of state law claims. Because of this conflict, the Conference's members are subject to inconsistent rules on whether the Railway Labor Act provides the exclusive means by which employment disputes can be resolved.

That system for resolving employment disputes is critical to peaceful labor-management relations in the railroad industry. The Conference thus has a vital interest in ensuring that the procedures established by the Railway Labor Act are not undercut or circumvented, and asserts that the majority position on the preemption ques-

tion is correct. For this reason, and because the Conference believes its analysis of the conflict in the state and federal courts over the preemption issue may assist this Court in considering whether to grant a writ of certiorari in this case, the Conference seeks leave to file the accompanying brief as *amicus curiae* in support of the petition for certiorari.

Respectfully submitted,

I. MICHAEL GREENBERGER
(Counsel of Record)
THOMAS J. MIKULA
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
General Counsel
NATIONAL RAILWAY
LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7218
Counsel for *Amicus Curiae*

Dated: December 24, 1986

TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | i |
| INTEREST OF *AMICUS CURIAE* | 1 |
| ARGUMENT | 1 |
| A. The Railway Labor Act Creates Exclusive Jurisdiction For Resolving Employment Disputes In Adjustment Boards | 2 |
| B. The State and Federal Courts Are In Severe Conflict Over The Scope of Preemption Under the Railway Labor Act | 4 |
| CONCLUSION | 14 |

## TABLE OF AUTHORITIES


| *Cases* | Page |
|---|---|
| *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320 (1972) | 4, 9 |
| *Balzeit* v. *Southern Pacific Transp. Co.*, 569 F. Supp. 986 (N.D. Cal. 1983) | 6, 11 |
| *Beers* v. *Southern Pacific Transp. Co.*, 703 F.2d 425 (9th Cir. 1983) | 6 |
| *Buell* v. *Atchison, Topeka & Santa Fe Ry.*, 771 F.2d 1320 (9th Cir. 1985), *cert. granted*, 106 S. Ct. 1946 (1986) | 12 |
| *Carson* v. *Southern Ry.*, 494 F. Supp. 1104 (D.S.C. 1979) | 5 |
| *Choate* v. *Louisville & Nashville R.R.*, 715 F.2d 369 (7th Cir. 1983) | 5 |
| *DeTomaso* v. *Pan American World Airways*, 220 Cal. Rptr. 493 (Cal. Ct. App. 1985), *review pending*, 714 P.2d 1239 (1986) | 6, 9 |
| *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711 (1945) | 3, 8 |
| *Farmer* v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977) | *passim* |
| *Gulati* v. *Burlington Northern R.R.*, 364 N.W.2d 446 (Minn. Ct. App. 1985) | 7 |
| *Gulati* v. *Burlington Northern R.R.*, 390 N.W.2d 743 (Minn. 1986), *petition for cert. pending*, No. 86-857 | *passim* |
| *Hanson* v. *City of Tacoma*, 719 P.2d 104 (Wash. 1986) | *passim* |
| *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963) | 3 |
| *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) | 5, 6 |
| *Koehler* v. *Illinois Central Gulf R.R.*, 488 N.E.2d 542 (Ill. 1985), *cert. denied*, 106 S. Ct. 3297 (1986) | *passim* |
| *Landfried* v. *Terminal R.R. Ass'n*, 721 F.2d 254 (8th Cir. 1983), *cert. denied*, 466 U.S. 928 (1984) | 5 |

## TABLE OF AUTHORITIES—Continued

Page

*Magnuson* v. *Burlington Northern R.R.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978) ..... *passim*
*Majors* v. *U.S. Air*, 525 F. Supp. 853 (D. Md. 1981) ..... 8
*Pennsylvania R.R.* v. *Day*, 360 U.S. 548 (1959) ..... *passim*
*Peterson* v. *Air Line Pilots Ass'n International*, 759 F.2d 1161 (4th Cir.), *cert. denied*, 106 S. Ct. 312 (1985) ..... 11
*Raybourn* v. *Burlington Northern R.R.*, 602 F. Supp. 385 (W.D. Mo. 1985) ..... 6, 9
*Rosemond* v. *National Railroad Passenger Corp.*, No. 85 Civ. 566 (S.D.N.Y. Sept. 18, 1986) (unpublished order) ..... 6
*Slocum* v. *Delaware, Lackawanna & Western R.R.*, 339 U.S. 239 (1950) ..... *passim*
*Stephens* v. *Norfolk & Western Ry.*, 792 F.2d 576 (6th Cir. 1986) ..... 5
*Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89 (1978) ..... 4
*United Steelworkers of America* v. *Warrior Gulf & Navigation Co.*, 363 U.S. 574 (1960) ..... 10
*Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366 (1955) ..... 3
*Wiley* v. *Missouri Pacific R.R.*, 430 So. 2d 1016 (La. Ct. App. 1982), *writ denied*, 431 S. 2d 1055 (1983) ..... 6

*Administrative Cases*

NRAB First Division Award No. 13574 (May 12, 1950) ..... 9
NRAB Third Division Award No. 25533 (June 28, 1985) ..... 9

*Statutes*

Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* ..... 7, 12

TABLE OF AUTHORITIES—Continued

Page

National Labor Relations Act, 29 U.S.C. § 152(2)-(3) ..... 2
Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* .....*passim*

*Miscellaneous*

Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment and Earnings*, Jan. 1986 ..... 4

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

---

No. 86-857

---

BURLINGTON NORTHERN RAILROAD COMPANY,
*Petitioner,*

v.

ROMESH GULATI,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the Supreme Court of Minnesota**

---

## BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

---

### INTEREST OF *AMICUS CURIAE*

The interest of the *amicus* is set forth in the accompanying motion for leave to file this brief.

### ARGUMENT

This case presents the important question of the extent to which the Railway Labor Act preempts state law claims filed by railroad and airline employees seeking to resolve in state and federal courts disputes arising out of their employment. We show below that through the Railway Labor Act, Congress created administrative bodies known as adjustment boards with exclusive jurisdiction over employment disputes in the railroad and airline indus-

tries. That exclusive administrative system is critical to peaceful labor-management relations in the railroad and airline industries. We show further that in recent years a severe conflict has developed in the state and federal courts over the extent to which the Railway Labor Act allows employment disputes to be adjudicated in the state and federal courts under state law. While a majority of the courts that have considered the question has held correctly that the Railway Labor Act, with its mandatory system of administrative remedies, preempts state law claims arising out of employment disputes, a growing number of courts, including the one below, have allowed railroad and airline employees to circumvent this exclusive system and resolve their employment disputes by filing state law claims in state and federal courts. We respectfully urge therefore that certiorari be granted in this case to resolve this conflict.

### A. The Railway Labor Act Creates Exclusive Jurisdiction For Resolving Employment Disputes In Adjustment Boards.

The Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, ("RLA"), establishes an exclusive and comprehensive system of federal remedies for resolving disputes in the railroad and airline industries between employees and employers. Under § 2(5) and § 3 First of the RLA, all "disputes . . . growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions," must be submitted for final and binding resolution to the National Railroad Adjustment Board. 45 U.S.C. §§ 151a(5), 153 First.[1]

---

[1] The National Railroad Adjustment Board ("NRAB") is a permanent federal administrative board comprising four divisions having jurisdiction over particular classes of railroad employees. 45 U.S.C. § 153 First (i). Section 3 Second of the Act authorizes the establishment of special boards of adjustment to decide disputes otherwise referable to the NRAB. 45 U.S.C. § 153 Second.

While Section 3 of the Act is not directly applicable to the airline industry, 45 U.S.C. § 182, Section 204 of the Act provides for the

These disputes, which are called "minor disputes" under the RLA, include not only controversies that involve the express terms of applicable collective bargaining agreements, but also claims "founded upon some incident of the employment relation . . . independent of these covered by the collective agreement." *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711, 723 (1945).

Congress's purpose in establishing this exclusive system for resolving disputes was to create "expert administrative board[s]" familiar with the "specialized technical nature" of industry custom and practice and railroad and airline collective bargaining agreements. *Pennsylvania R.R.* v. *Day*, 360 U.S. 548, 551, 553 (1959). As this Court has observed, " 'The railroad world is like a state within a state. Its population . . . has its own customs and its own vocabulary, and lives according to rules of its own making.' " *Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366, 371 (1955) (quoting Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 568-69 (1937)). By creating an administrative body to resolve all disputes arising out of the employment relationship, Congress hoped to provide for a uniform, orderly, and expert application of federal remedies to workplace controversies, as a means of preventing inconsistent resolution of disputes from leading to labor unrest that could interrupt the nation's transportation system. *Day*, 360 U.S. at 551-53; *Slocum* v. *Delaware, Lackawanna & Western R.R.*, 339 U.S. 239, 243 (1950).

The exclusivity of this scheme of administrative remedies results in "a denial of power in any court—state

---

establishment of adjustment boards to decide similar disputes in that industry. 45 U.S.C. § 184. See generally *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963). Employers and employees subject to the Railway Labor Act are exempt from the coverage of the National Labor Relations Act. See 29 U.S.C. § 152(2)-(3).

as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act." *Slocum*, 339 U.S. at 244. Congress "considered it essential" to keep railroad and airline employee grievances "within the Adjustment Board[s] and out of the courts." *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89, 94 (1978). Accordingly, this Court has held that a railroad employee may not avoid submitting an employment dispute to an adjustment board by filing a claim for relief under state law in state or federal court. *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320, 325 (1972); *Day*, 360 U.S. at 552. The consequences of failing to preserve the exclusivity of this system is readily seen by considering the vast number of disputes affected. The railroad and airline industries currently employ over 900,000 persons, and more than 180,000 grievances are presented annually to the 12 major carriers in the railroad industry alone.[2] If even a small percentage of these hundreds of thousands of grievances were allowed to evade the RLA's scheme of administrative relief by being brought as state or federal court actions, the result would be a major influx of new litigation.

### B. The State and Federal Courts Are In Severe Conflict Over The Scope Of Preemption Under The Railway Labor Act.

1. In the past several years, increasing numbers of employees in the railroad and airline industries have sought to circumvent the RLA's exclusive and comprehensive administrative process by pleading their employment grievances in the form of state law claims in the state and federal courts. This effort has led to a severe

---

[2] See Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment and Earnings*, Jan. 1986 at 186 (922,000 persons employed in railroad and air transportation industries on average during 1985); *Amicus* Brief for Association of American Railroads and National Association of Railroad Trial Counsel at 7 & n.6, *Atchison, Topeka & Santa Fe Ry.* v. *Buell*, No. 85-1140 (petition granted May 5, 1986).

conflict in the state and federal courts over the extent to which the RLA preempts state law claims arising out of employment disputes in the railroad and airline industries. In most instances, these employees have been unsuccessful in their efforts, as most of the courts have given a broad preemptive effective to the RLA. See, *e.g.*, *Stephens* v. *Norfolk & Western Ry.*, 792 F.2d 576 (6th Cir. 1986); *Lanfried* v. *Terminal R.R. Ass'n*, 721 F.2d 254 (8th Cir. 1983), *cert. denied*, 466 U.S. 928 (1984); *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Magnuson* v. *Burlington Northern R.R.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *Koehler* v. *Illinois Central Gulf R.R.*, 488 N.E.2d 542 (Ill. 1985), *cert. denied*, 106 S. Ct. 3297 (1986). These courts have been faithful to Congress's design in enacting the RLA and have declined to allow railroad and airline employees to recast their grievances arising out of the employment relationship in terms of state law claims such as the intentional infliction of emotional distress, retaliatory discharge, and slander. See, *e.g.*, *Jackson*, 717 F.2d 1045 (retaliatory discharge); *Choate* v. *Louisville & Nashville R.R.*, 715 F.2d 369 (7th Cir. 1983) (intentional infliction of emotional distress); *Magnuson*, 576 F.2d 1367 (same); *Carson* v. *Southern Ry.*, 494 F. Supp. 1104 (D.S.C. 1979) (slander); *Koehler*, 488 N.E.2d 542 (retaliatory discharge). Instead, these courts have ruled that a plaintiff can not use "[a]rtful pleading" to disguise a minor dispute in the form of a state law claim, *Magnuson*, 576 F.2d at 1369, and that the RLA preempts such claims because that statute creates a comprehensive remedial scheme of administrative remedies for resolving employment grievances.

Recently, however, some courts, including the court below, have given a more narrow reading to the preemptive scope of the RLA. See, *e.g.*, *Gulati* v. *Burlington Northern R.R.*, 390 N.W.2d 743 (Minn. 1986), *petition for cert. pending*, No. 86-857; *Hanson* v. *City of Tacoma*,

719 P.2d 104 (Wash. 1986); *DeTomaso* v. *Pan American World Airways*, 220 Cal. Rptr. 493 (Cal. Ct. App. 1985), *review pending*, 714 P.2d 1239 (1986); *Wiley* v. *Missouri Pacific R.R.*, 430 So. 2d 1016 (La. Ct. App. 1982), *writ denied*, 431 So. 2d 1055 (1983); *Raybourn* v. *Burlington Northern R.R.*, 602 F. Supp. 385 (W.D. Mo. 1985); *Balzeit* v. *Southern Pacific Transp. Co.*, 569 F. Supp. 986 (N.D. Cal. 1983). These courts have allowed railroad and airline employees to avoid the RLA's mandatory scheme of administrative remedies by pleading employment grievances in the form of state law claims for unlawful discharge or discipline, *Hanson*, 719 P.2d 104; *Wiley*, 430 So.2d 1016, intentional infliction of emotional distress, *Gulati*, 390 N.W.2d 743; *Balzeit*, 569 F. Supp. 986, and defamation, *DeTomaso*, 220 Cal. Rptr. 493; *Rosemond* v. *National Railroad Passenger Corp.*, No. 85 Civ. 5661 (S.D.N.Y. Sept. 18, 1986) (unpublished order). The conflict that has developed prompted Judge Posner of the Seventh Circuit to write that "the case law on the displacement of [state] tort law by the Railway Labor Act is in disarray." *Jackson*, 717 F.2d at 1061 (dissenting opinion).

The majority rule is illustrated by *Beers* v. *Southern Pacific Transp. Co.*, 703 F.2d 425 (9th Cir. 1983), in which a railroad employee filed a state tort claim for intentional infliction of emotional distress that arose out of a confrontation with a supervisor during an investigatory hearing at which the employee was representing a co-worker. The employee was fired for insubordination because of the confrontation, but he was reinstated following a hearing before an adjustment board. The railroad argued that the employee's claim was preempted by the RLA, and the trial court agreed. On appeal, the Ninth Circuit observed that adjudication of the employee's state tort claim would have required an "interpretation and examination of the collective bargaining agreement resulting in state intervention into the area of fed-

eral labor law," because the employee's complaints related to work conditions, disciplinary procedures, and representation rights. 703 F.2d at 429. Accordingly, the court held that the state tort claim was preempted and affirmed the dismissal of the case.

The contrary approach found in the body of case law allowing state law claims to go forward, notwithstanding the preemptive effect of the RLA, is seen in the decision by the court below. *Gulati* v. *Burlington Northern R.R.*, 390 N.W.2d 743 (Minn. 1986). *Gulati* arose when a railroad employee filed suit against the railroad alleging, *inter alia*, that the railroad intentionally inflicted emotional distress upon him through a pattern of harassment by supervisors and co-workers, which culminated in his dismissal from the railroad. This lawsuit was brought in spite of the fact that the employee's dismissal was processed under the RLA's grievance procedures and was affirmed by an adjustment board. The railroad moved to dismiss this claim on the ground that the RLA preempted this state tort action because adjustment boards have exclusive jurisdiction over such workplace disputes. The trial court denied the motion to dismiss, but agreed to certify the question to the Minnesota Court of Appeals, which affirmed. *Gulati* v. *Burlington Northern R.R.*, 364 N.W.2d 446 (Minn. Ct. App. 1985).

The Minnesota Supreme Court granted a petition for further review and affirmed the ruling that the employee's state tort claim was not preempted by the RLA.[3] The court reasoned that "minor disputes" under the RLA are limited to those "matter[s] within the parameters of a collective-bargaining agreement," 390 N.W.2d at 750, and that an employee's claim for emotional dis-

---

[3] The court also held that the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*, which provides a cause of action for damages to railroad employees suffering work-related injuries because of negligence attributable to their employer, did not preempt plaintiff's state law claim. 390 N.W.2d at 755.

tress "result[ing] from a continual pattern of harassment is not a minor dispute" but "is premised on the tort-law principle" that protects against atrocious and intolerable conduct. *Id.* In addition, the court relied heavily upon this Court's decision in *Farmer* v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977), which held that the National Labor Relations Act did not preempt a union member's claim for intentional infliction of emotional distress against his union. Although *Farmer* involved a different federal statute, the Minnesota Supreme Court concluded that *Farmer* was equally applicable in the RLA context, and that the balance between state and federal interests, as envisioned by *Farmer*, favored allowing the employee to pursue his tort claim in state court. 390 N.W.2d at 751-753 & n.6.

2. As the above examples indicate, the growing conflict over the scope of RLA preemption involves sharply divergent positions on two questions. The first question is the scope of "minor disputes" under the Railway Labor Act. Courts holding that the RLA preempts state law claims generally have observed that all employment grievances must be submitted to adjustment boards for resolution, consistent with the broad definition of a minor dispute used in *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711 (1945), in which this Court defined minor disputes as covering claims under the collective bargaining agreement or those "founded upon some incident of the employment relation . . . *independent* of those covered by the collective [bargaining] agreement." *Id.* at 723 (emphasis added). See also, *e.g.*, *Magnuson*, 576 F.2d at 1369 (minor disputes are those that are "arguably governed" by or "inextricably intertwined with the grievance machinery of the collective bargaining agreement."); *Majors* v. *U.S. Air*, 525 F. Supp. 853, 856 (D. Md. 1981) (citing *Magnuson*). This broad definition follows from the RLA itself, which provides "for the prompt and orderly settlement of *all* disputes growing out of grievances *or* out of the interpretation or application of agreements

covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a(5) (emphasis added).[4] In addition, courts holding that state law claims are preempted have paid heed to this Court's teachings in *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320 (1972), wherein this Court cautioned that a railroad employee cannot avoid submitting a minor dispute to an adjustment board by framing the dispute as a state law claim. 406 U.S. at 323-24. See also, *e.g.*, *Magnuson*, 576 F.2d at 1369 ("[a]rtful pleading" cannot disguise the fact that claim is a minor dispute); *Koehler*, 488 N.E.2d at 546 ("Stripped to its essentials, plaintiff's suit is a reformulation in tort of his grievance which . . . fell within the purview of the RLA.")

In the past several years, however, some courts have allowed state law claims to go forward on the basis of a more restrictive definition of "minor dispute," limited to only those complaints where the "source of [the] right" is the collective bargaining agreement, *Hanson*, 719 P.2d at 108, or where the "four corners of the collective bargaining agreement" are involved, *Gulati*, 390 N.W.2d at 750. And, instead of following this Court's lead in *Andrews* and carefully scrutinizing state law claims to determine whether they belong before an adjustment board, these courts have allowed the claims to go forward as being "legally independent" of any grievances for an adjustment board. *DeTomaso*, 220 Cal. Rptr. at 497; *Raybourn*, 602 F. Supp. at 387.

---

[4] Indeed, the breadth of this definition is confirmed by adjustment board decisions holding that the type of conduct that is the subject of complaint in this case, harassment from fellow-workers and supervisors, gives rise to a "minor dispute" reviewable by an adjustment board. *E.g.*, NRAB Third Division Award No. 25533 (June 28, 1985) (finding jurisdiction over claim of harassment from supervisor but holding that claim was time-barred and procedurally defective); NRAB First Division Award No. 13574 (May 12, 1950) (claim initiated by employees alleging that co-worker threatened them with bodily harm and physical violence).

3. Even when the question of whether a "minor dispute" is involved is not at issue, a second question that is further dividing the courts is the application of *Farmer* v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977), a narrow decision in which this Court held that the National Labor Relations Act ("NLRA") did not preempt a union member's state tort claim against his union for intentional infliction of emotional distress. The *Farmer* Court based its decision on the absence of any provision of the NLRA protecting against the "outrageous conduct" that is necessary to prevail on a state tort claim for emotional distress, and the state's substantial interest in protecting its citizens against such abuse. The Court pointed out, however, that because of the federal interests involved, certain conduct that is regulated by the NLRA could not be the subject of a tort claim for emotional distress, even though the conduct might cause considerable emotional distress. *Id.* at 303-06.

Courts that have held correctly that the RLA preempts state law claims have observed that the differences between the NLRA (which merely protects and prohibits certain conduct) and the RLA (which provides a comprehensive scheme of remedies for employment grievances) warrant against uncritical application of the *Farmer* exception for NLRA preemption to cases involving preemption under the RLA.[5] These courts have reasoned that because the RLA creates a comprehensive scheme for redressing employment disputes, "preemp-

---

[5] Under the NLRA employees and unions voluntarily may agree to arbitrate disputes arising over the interpretation and application of collective bargaining agreements, and the federal courts have jurisdiction to enforce such arbitration agreements. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). There is no general or mandatory statutory procedure, however, for resolving these contractual disputes or other grievances which do not rise to the level of prohibited unfair labor practices within the jurisdiction of the National Labor Relations Board.

tion of state law claims under the RLA [is] more complete" than preemption under the NLRA, *Peterson* v. *Airline Pilots Ass'n International*, 759 F.2d 1161, 1169 (4th Cir.), *cert. denied*, 106 S. Ct. 312 (1985), as it is more likely that allowing a state law action to go forward will "threaten undue interference with the federal regulatory scheme." *Koehler*, 488 N.E.2d at 545 (quoting *Farmer* v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290, 302 (1977)).

In contrast, those courts that have allowed state law claims to proceed have applied the *Farmer* exception for NLRA preemption without alteration to preemption under the RLA. Ignoring the fundamental differences in the structure of the two statutes on this issue, these courts have observed that it is permissible to "refer to the NLRA . . . for assistance in construing the RLA," *Balzeit*, 569 F. Supp. at 988 n.5, or that the RLA's remedial scheme "is not unlike the limited scope of the NLRA's dispute resolution process." *Gulati*, 390 N.W.2d at 751 n.6.

4. This growing dispute has left the lower courts in a state of confusion on the question of RLA preemption, and the principle at issue in these cases is of considerable importance for three reasons. First, the inconsistent decisions threaten to undermine the goals of uniformity and stability that led Congress to enact the RLA. As stated previously, Congress created the mandatory and exclusive system of administrative remedies envisioned by the RLA to bring stability to the railroad industry by ensuring the uniform application of federal remedies. See, *e.g.*, *Pennsylvania R.R.* v. *Day*, 360 U.S. at 551-53; *Slocum* v. *Delaware, Lackawanna & Western R.R.*, 339 U.S. at 243. As a result of the considerable confusion over the scope of preemption under the RLA, many disputes formerely handled in a uniform fashion by adjustment boards are now being brought in the state and federal courts, contrary to Congress's intent. Moreover, because these courts lack the familiarity with the practices and

collective bargaining agreements unique to the railroad and airline industries, it is likely that similar disputes will be resolved in an inconsistent fashion. And because of the vast number of employees in the railroad and airline industries, state and federal courts may be inundated with claims normally processed by adjustment boards until this conflict is resolved. Indeed, the flood of lawsuits involving these issues has already begun, as evidenced in part by the number of reported decisions on this question in the past several years.

Second, the importance of this question is underscored by the interstate nature of the industries subject to the RLA. The railroad industry operates in 49 states and the airline industry operates in all 50 states, with most individual carriers operating in more than one state. As a result of the varying rulings on the scope of RLA preemption, a railroad or airline employee in one jurisdiction will be required to file a grievance with the adjustment board, while another employee of the same carrier in a different jurisdiction will have the option of bringing a court action to resolve an identical dispute.

Finally, on December 1, 1986, this Court heard oral argument in *Atchison, Topeka & Santa Fe Ry.* v. *Buell*, No. 85-1140 (petition granted May 5, 1986). The issue in *Buell* is whether a railroad employee's allegation of purely psychological harm resulting from a pattern of workplace harassment states a claim for relief under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.*, or whether such a claim is a minor dispute subject to the remedial provisions of the RLA. Although this case and *Buell* arose from similar facts, the cases differ in that resolution of *Buell* will require this Court to examine carefully the relationship between two federal statutes, the FELA and the RLA, and to determine the extent to which claims by railroad employees must be asserted under one or the other statute. The issue in this case, however, is the question of the extent to which the RLA preempts state law claims arising out of em-

ployment grievances. While this preemption question presented here is not directly at issue in *Buell*, several parties filing briefs as *amici curiae* there pointed out that this question was related to *Buell* and urged that the issue was an important one. See *Amicus* Brief for Teamsters for a Democratic Union and Public Citizen at 3-7; *Amicus* Brief for National Railway Labor Conference at 27-30. An additional issue presented by this case, but not by *Buell*, is whether the FELA preempts state law claims by railroad employees seeking redress for emotional injury. See Petition for Writ of Certiorari at 16-18, *Burlington Northern R.R.* v. *Gulati*, No. 86-857.[6]

Once the Court defines the relationship between the RLA and the FELA in *Buell*, by granting certiorari in this case the Court can then decide to what extent those same two federal statutes occupy the field for work-related injuries and grievances, to the exclusion of state law. This will allow the Court to decide once and for all whether railroad and airline employees must submit employment disputes to an adjustment board or whether there are other available vehicles for remedying these disputes.

In sum, we urge that this Court grant the writ of certiorari in this case in order to resolve the conflict in the state and federal courts that has surfaced in recent years over the preemptive scope of the RLA. Resolution of this conflict is essential to preserving the exclusivity of the scheme of administrative remedies created by the RLA for resolving employment disputes in the railroad and airline industries. Moreover, granting certiorari in this case will complement this Court's deliberations in *Buell* and will allow the Court to resolve issues that are closely related to but not presented by *Buell*.

---

[6] The Conference adopts the petitioner's argument that the Minnesota Supreme Court's decision that the FELA does not preempt claims for intentional infliction of emotional distress is in conflict with decisions of this Court and the courts of appeals for several circuits, Petition for Certiorari at 16-18, and urges that this is an additional reason for granting certiorari in this case.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

I. MICHAEL GREENBERGER
(Counsel of Record)
THOMAS J. MIKULA
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
General Counsel
NATIONAL RAILWAY
LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7218
Counsel for *Amicus Curiae*

Dated: December 24, 1986